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UNIFORM COMMERCIAL CODE COMMENTARY

TIME LIMITATIONS ON WARRANTIES: APPLICATION AND VALIDITY UNDER THE U.C.C.

Courts under common law and the Uniform Commercial Code have applied diverse theories to clauses establishing time limitations on the period during which a buyer can bring a claim for breach of warranty. Under common law a time clause was held invalid if it was unreasonable, while under the Code three different approaches are possible. The first allows a court to invalidate a clause if it is manifestly unreasonable. The second approach allows the court to provide a buyer with relief if the clause eliminates all of a buyer's remedies for breach of the warranty. Under the third approach the courts may invalidate a clause if it is found to be unconscionable. As a result of this diversity, courts have applied different theories to similar fact patterns and have created an element of confusion as to the law applicable to time limitations on warranties. This comment examines the different theories that courts have applied to time limit clauses in sales warranties. The three methods provided by the Code will be examined in the light of common law to determine which is most applicable to this area.

I. PRE-CODE CASES AND THEORY

Under common law where two parties agreed to a time limit for the submission of claims of breach of warranty, the courts generally held such limitations valid, provided the specific time period involved was reasonable.¹ Reasonableness was determined in respect to the type of defect upon which the claim of breach of warranty was alleged,² without regard to whether the warranty was express or implied. When the defect "is one which cannot be discovered by ordinary inspection . . . whether the seller's breach of obligation is of an express warranty, an implied warranty, or, under the terminology of the court, breach of a promise not properly classified as a warranty, the buyer may recover damages."³ Where an inspection would have revealed open defects, claims for breach of warranty for these defects were barred after the time period had expired. But if the defect was hidden, both implied and express warranties were still in effect despite time limitations.⁴ Even very short time periods were held reasonable in respect to obvious defects. Thus, where a defect could have been discovered upon ordinary

¹ See, e.g., *Jessel v. Lockwood Textile Corp.*, 276 App. Div. 378, 95 N.Y.S.2d 77 (1950).

² *Id.* at 379, 95 N.Y.S.2d at 78.

³ 3 S. Williston, *The Law Governing Sales of Goods* § 489b (rev. ed. 1948).

⁴ *Jessel v. Lockwood Textile Corp.*, 276 App. Div. 378, 379, 95 N.Y.S. 2d 77, 78 (1950). See also *Colvin v. Superior Equip. Co.*, 96 Ariz. 113, 118-20, 392 P.2d 778, 781-82 (1964).

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examination of the goods or a sample, time periods as short as five days have been held valid,⁵ and the buyer's failure to act within such time amounted to a waiver of his warranty.⁶ Where the defect was latent, "[t]he time which this defect took to assert itself fixed the reasonableness of the time for complaint"⁷ Where the buyer notified the seller of a latent defect within a reasonable time, the courts treated the situation the same as if no clause was agreed upon, giving no weight to the fact that the buyer had agreed to a time period.

Provisions in sales contracts requiring prompt inspection or testing of the goods and prompt notice of any defects within a specified period are a common part of commercial transactions. Prompt notice allows the seller to rectify the problem before considerable damage occurs, and in turn saves the buyer further expense and trouble, as where the goods are to be manufactured for consumption by the general public. Courts look favorably upon such agreements as serving a legitimate business purpose⁸ only if they are reasonable, the defect is obvious and prompt notice is possible.⁹

Not all defects, however, can be handled with such prompt response, and in order to prove the limitation unreasonable, the buyer must then show that prompt response with respect to the alleged defect was not possible. In *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*,¹⁰ the buyer, a wholesaler, received in March, 303 cases of ketchup, 271 of which remained unsold by September. The cases were then inspected by federal authorities, and after microscopic examination the ketchup was found to contain a mold filament in 67 percent of the microscopic fields examined. The ketchup was condemned and a United States Marshall, acting under a court order, destroyed it. The buyer sued the seller for return of the purchase price. As a defense the seller offered a clause in the sales contract providing for all claims to be made within ten days from receipt of the goods. The court said, with respect to timeliness, that such clauses are valid where the defect is patent but not where it is latent.¹¹ In this case there was no doubt of latency because the presence of the mold could only be detected by microscopic examination, hence, the claim for breach of implied warranty of fitness was not barred since prompt notice was impossible. In a similar case where the latency concerned a defect in the size of canned prunes, the court stated that a stipulation as to time limits on

⁵ *Pratt v. Meyer*, 75 Ark. 206, 87 S.W. 123 (1905).

⁶ *Id.* at 211, 87 S.W. at 125.

⁷ *Los Angeles Olive Growers Ass'n v. Pacific Grocery Co.*, 119 Wash. 293, 297, 205 P. 375, 377 (1922).

⁸ Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 Iowa L. Rev. 843, 858 (1960).

⁹ Prompt notice is possible where, for example, there is damage to canned foods in transit, rustiness of the can or faulty labeling. *National Grocery Co. v. Pratt-Low Preserving Co.*, 170 Wash. 575, 585, 17 P.2d 51, 54 (1932).

¹⁰ 93 Utah 414, 73 P.2d 1272 (1937).

¹¹ *Id.* at 421, 73 P.2d at 1275.

claims applies only to easily observable defects.¹² It was held not incumbent on a buyer to open cans he will later sell to examine the number and size of goods he had purchased; otherwise he would not know how many the law required him to open and where he was to stop.¹³ Such a requirement clearly would be unfair and unreasonable. Furthermore, in some cases cans were opened, goods were examined within the time limitation and appeared to be suitable. However, after the period had expired, defects appeared. It was held that such inspection did not prejudice the buyer's rights in regard to latent defects.¹⁴

Where the defect has not appeared until after the use of a product the courts have held time clauses unreasonable, just as they have in cases where the defect was not discovered until after goods were processed.¹⁵ In *W. T. Adams Mach. Co. v. Turner*,¹⁶ involving the sale of machinery which contained hidden imperfections, the court said that the time clause had no effect on the express warranty except with respect to defects of obvious character. To hold otherwise would result in an important qualification of the warranty, since in cases where an imperfection could not be discovered until after use of the product, application of a time limit would deprive the buyer of several features of the warranty. The court stated "[i]t is not reasonably possible that the parties so intended in this contract."¹⁷

Once a time limitation clause was held invalid, a reasonableness test was used to determine the length of time the buyer had to notify the seller of the defect. In *Torrance v. Durisol, Inc.*,¹⁸ involving the sale and installation of defective roofing materials by a sub-contractor to a contractor, a ten-day time limitation was held invalid. The court then declared that notice of breach of warranty must be given within a reasonable time after the buyer knows or ought to know of such breach. In this case the notice was timely because it was given shortly after it became possible to discover the defect, and therefore the seller was held liable.¹⁹ The question of reasonableness is one of fact for the

¹² *National Grocery Co. v. Pratt-Low Preserving Co.*, 170 Wash. 575, 17 P.2d 51 (1932).

¹³ *Id.* at 584, 17 P.2d at 54.

¹⁴ *Los Angeles Olive Growers Ass'n v. Pacific Grocery Co.*, 119 Wash. 293, 294-96, 205 P. 375, 376 (1922).

¹⁵ In *Jessel v. Lockwood Textile Corp.*, 276 App. Div. 378, 95 N.Y.S.2d 77 (1950), the seller expressly warranted the goods to be washable, preshrunk and fast color. There was a time limitation clause of ten days and the clause also provided no claim would be accepted after the goods were cut or processed. The buyer discovered the goods were not as warranted, but not until after they were cut and processed, which occurred more than ten days after receipt. The court said the defect was latent and not discoverable until after processing, therefore the limitation was unreasonable and could not stand. The buyer's right of inspection included a reasonable time in which to ascertain the quality of the goods. *Id.* at 379, 95 N.Y.S.2d at 78.

¹⁶ 162 Ala. 351, 50 So. 308 (1909).

¹⁷ *Id.* at 356, 50 So. at 309.

¹⁸ 20 Conn. Supp. 62, 122 A.2d 589 (Super. Ct. 1956).

¹⁹ Where a time limitation is held invalid, a buyer still may not recover if he waits too long after the discovery of the defect before giving notice. If he waits an unreason-

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jury in determining whether the limitation was unreasonable, and, if so, whether notice was given within a reasonable time.²⁰

The Uniform Commercial Code adopted, with some variation, the reasonableness approach. Different approaches also were provided by the Code under sections concerned with sales agreements and warranties. The question arises as to whether the reasonableness test of the Code is the same as that of common law, and whether the approaches adopted by other Code sections are equally applicable to time clauses.

II. CASES AND APPROACHES UNDER THE UNIFORM COMMERCIAL CODE

A. *The Reasonableness Approach*

The Code allows the parties to fix a specific time for notification, and section 1-204 holds such time limiting clauses valid unless they are manifestly unreasonable.²¹ Thus, time clauses are generally valid under the Code, "however, provision is made for disregarding a clause which whether by inadvertence or overreaching fixes a time so unreasonable that it amounts to eliminating all remedy under the contract."²² In determining what is a reasonable time under both common law and the Code, the nature, purpose and circumstances of the transaction are taken into account.

The approach under section 1-204 is similar to the approach of the pre-Code cases, except that section 1-204 uses the term "manifestly unreasonable." This change is surprising since there was no other viewpoint under common law and the reasonability theory was not criticized. A problem therefore arises as to whether the term "manifestly" changes the common law approach. Authorities have not closely studied this problem although some commentators mention that an element

able amount of time, the seller is protected. See *United States Gypsum Co. v. Birdsboro Steel Foundry & Mach. Co.*, 160 Pa. Super. 548, 559, 52 A.2d 344, 350 (1947).

²⁰ *Id.* at 559, 52 A.2d at 350. See also *National Container Corp. v. Regal Corrugated Box Co.*, 383 Pa. 499, 505, 119 A.2d 270, 273 (1956).

²¹ Unless otherwise specified all references to the Uniform Commercial Code are to the 1962 Official text. U.C.C. § 1-204 provides:

(1) Whenever this act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

²² U.C.C. § 1-204, Comment 1. The Comment states in pertinent part:

Subsection (1) recognizes that nothing is stronger evidence of a reasonable time than the fixing of such time by a fair agreement between the parties. However, provision is made for disregarding a clause which whether by inadvertence or overreaching fixes a time so unreasonable that it amounts to eliminating all remedy under the contract

U.C.C. § 1-204, Comment 2 states in part:

[T]he circumstances of the transaction, including course of dealing or usages of trade or course of performance may be material. On the question what is reasonable time these matters will often be important.

of confusion and inconsistency results,²³ and suggest a rewording of section 1-204 to clarify or define the meaning of "manifestly unreasonable."²⁴

One view interprets the use of "manifestly" as intended to distinguish between clauses that are mandatory and those that are optional.²⁵ If the clause is mandatory and cannot be varied by the buyer, the agreement fixing a set time would presumably be invalid, if the set time is unreasonable. Thus, the fact that the clause is both mandatory and unreasonable would make it manifestly unreasonable. On the other hand, where the parties are free to fix the time in question by their own agreement, the fact that the time agreed on is unreasonable may not be controlling. Under this view a stricter test is used if the parties are free to bargain on the time period.

Another view is that in the area of sales the word "manifestly" adds nothing to the pre-Code approach.²⁶ Where section 1-204 is applied to a sales agreement it becomes involved with other sections, specifically sections 2-607(3)(a)²⁷ and 2-608(2).²⁸ These sections provide that in the absence of a time limitation a buyer must notify the seller within a *reasonable* time after he has or should have discovered a breach of the warranty or else his claim is barred. Thus, by this approach section 1-204, in respect to warranties governed by Article 2, interprets "manifestly unreasonable" as meaning "unreasonable," so as to apply the same standard as that of common law.

It is submitted that the better view as to the significance of the modifier "manifestly" is that the drafters intended to apply a stricter test to the buyer who has agreed to a time clause than the test used when there is no time clause.²⁹ The Official Comment to section 1-204 does not mention the term "manifestly," but words like "obviously unfair," and "so unreasonable that all remedy is exhausted" are used, implying that the drafters intended a stricter standard than that of common law.³⁰ Since the Code does not define "manifestly," courts

²³ 1 New York State Law Revision Commission [N.Y.S.L.R.C.], Study of the Uniform Commercial Code 317-18 (1955). The Commission noted that the meaning attached to the word "manifest" by the Comment to § 1-204 was inconsistent with the introductory words of subsection (1).

²⁴ N.Y.S.L.R.C., Proceedings of the Commission 363 (1956).

²⁵ 1 N.Y.S.L.R.C., Study of the U.C.C. 317 (1955).

²⁶ *Vandenberg v. Siter*, 204 Pa. Super. 398, 204 A.2d 494 (1964) (by implication).

²⁷ U.C.C. § 2-607(3)(a) provides:

[W]here a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy.

²⁸ U.C.C. § 2-608(2) provides:

Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

²⁹ Although §§ 2-607(3)(a) and 2-608(2) use the word "reasonable," they apply when there is no time clause. Section 1-204(1) applies when there is a time clause and uses the term "manifestly unreasonable."

³⁰ U.C.C. § 1-204, Comment 1.

should provide the necessary guidance. These guidelines have not been supplied since there are few cases under the Code dealing with time limitations, and in those cases the courts employ the same reasoning as pre-Code cases, thus supporting the view that the approach of the Code is the same as common law.

In *Vandenberg v. Siter*³¹ the seller, who was a grower and dealer of flower bulbs, sued the buyer, a flower dealer, for the purchase price of certain bulbs. The buyer counterclaimed averring breach of an express warranty that the bulbs were to be healthy and sound at the time of shipment, and breach of the implied warranty in that they were to be fit for the purpose for which they were sold.³² The contract also stated that "all claims hereunder shall be deemed waived unless presented within eight (8) days after receipt of the goods."³³ The bulbs appeared in good condition upon receipt but a month later brown specks developed and an expert was consulted. It was determined that the bulbs were not merchantable and thus were not worth planting. Judgment was for the seller since the buyer's expert testimony that it was not possible to discover this condition until flowering time, or until some time beyond the time period for claims, was excluded by the trial court which took the position that no evidence was admissible relative to events occurring after the eight day period.³⁴

The appellate court reversed and remanded, basing its holding on section 1-204. The court reasoned that if the jury believed that the bulbs' failure to flower resulted from a defective condition existing at the time of shipment, the failure fell within the express warranty.³⁵ The appellate court held that the trial court was in error in not admitting the evidence, and that it was for the jury to decide if the eight day period was reasonable.³⁶ The court held that if the defects were latent and could not be discovered within the time period, section 1-204 would apply to invalidate the clause.³⁷ The court stated:

[P]arties may by their contract limit the time for . . . notice . . . but the limitation must be reasonable. A limitation which renders the warranty ineffective as regards latent defects, literally covered by the warranty but not discoverable within the limitation period . . . is manifestly unreasonable and therefore invalid under § 1-204 of the code.³⁸

³¹ 204 Pa. Super. 392, 204 A.2d 494 (1964).

³² Id. at 393, 204 A.2d at 496.

³³ Id. at 394, 204 A.2d at 496.

³⁴ Id. This seems to be a mistake on the part of the trial court since the evidence should have been admitted to throw light on the clause and the circumstances of this particular business.

³⁵ Id. at 395, 204 A.2d at 497. According to the court the bulbs' flowering ability at the time of shipment was warranted and if the defect existed at that time, even if not discoverable until some time later, the warranty was breached.

³⁶ Id. at 398, 204 A.2d at 498.

³⁷ Id.

³⁸ Id.

The court went on to cite as precedent pre-Code cases with similar reasoning, holding time clauses invalid as unreasonable with respect to latent defects.³⁹ The court used the words "manifestly unreasonable" and "unreasonable" interchangeably, and did not concern itself with a definition of the term "manifestly" but merely applied the same reasoning as pre-Code cases.

Another recent case under the Code which employed section 1-204 without considering the meaning of the word "manifest" was *Neville Chem. Co. v. Union Carbide Corp.*⁴⁰ Union Carbide processed natural gas, reduced it to a liquid form, refined it and sold one of the resulting products, a resin oil, to Neville Chemical who used the oil, designated U-171, in the manufacture of resins for shoe soles and other products. This case involved a large shipment of U-171 under a contract of sale with a clause providing that the buyer accepted all material and waived all claims with respect thereto, unless notice was given within fifteen days.⁴¹ A contaminant entered the production process of U-171 at one of the seller's plants and started a chemical combination with the natural components of the oil. The U-171 was shipped to the buyer who in turn produced his resin and sold it to manufacturers of various goods. After end products had been produced and had entered the hands of consumers, the contaminant in the U-171 began its reverse process, breaking down into components and producing a foul odor, which necessitated the destruction of the product. In the resulting suit brought by Neville, the seller relied on the time clause as relieving it from any warranty obligation.

The District Court for the Western District of Pennsylvania observed that the defect was not only latent and nondiscoverable by ordinary testing, but that there was no reason to even suspect the presence of the contaminant until the complex chemical process began its reverse reaction. Once the breakdown began, it was relatively easy to identify the Neville resin as the source of the odor, but only after long and extensive research was the U-171 pinpointed as the source of the contaminant. Therefore, the court stated, "we have little hesitation in deciding that the application of the time limitation is manifestly unreasonable"⁴² and is therefore invalid under section 1-204. It did not however differentiate between unreasonable and manifestly unreasonable, but merely stated that the time clause was manifestly unreasonable with respect to the latent defect.

The *Vandenberg* and *Neville* courts treatment of section 1-204 as a continuation of pre-Code law can be interpreted as a trend future cases will take in respect to time clauses and latent defects, yet the

³⁹ Id. at 398, 399, 204 A.2d at 498.

⁴⁰ 294 F. Supp. 649 (W.D. Pa. 1968).

⁴¹ Id. at 654.

⁴² Id. at 655. The court cited the *Vandenberg* case in support of its holding. Also, the court was disturbed by evidence to the effect that Union Carbide had information in its files which had been circulated to certain personnel connected with production of U-171, advising of contact with a contaminant and requesting reports of any adverse reaction. No information was sent to any of the buyers of U-171. Id. at 653-54.

cases presented such clear facts that the courts were not required to distinguish between manifest and plain unreasonableness. If cases arise with less compelling fact situations the courts will be required to distinguish and define "manifestly" as meaning more than plain unreasonableness, as is the preferable result, or definitely state that "manifestly unreasonable" is simply another way of stating "unreasonable."

Once a time clause is found to be invalid under section 1-204, section 2-607(3)(a) applies and the buyer must give the seller notice of the breach within a reasonable time after the buyer knows, or should know, of the breach or the buyer is barred from making his claim.⁴³ This is the same test that was used at common law once a time clause was found unreasonable, and, as under the common law, this question is for the jury.⁴⁴

B. The Remedy Theory

Some authorities have suggested another approach by means of which buyers may circumvent time clauses. This approach is the use of section 2-719(2),⁴⁵ whereby a clause which limits a buyer's remedy under the warranty is invalidated. Section 2-719(2) has been used to provide a new remedy where an exclusive or limited remedy fails its essential purpose. For example, a remedy for breach of warranty based on a claim of a latent defect not discoverable within the time period fails if it is barred by a time clause. However, a major part of the buyer's value of the bargain is his warranty. Thus, the Official Comment to section 2-719(2) says, if circumstances cause an apparently reasonable clause to fail in its purpose or deprive a party of the substantial value of the bargain, it cannot stand and the general remedy provisions of the article become applicable.⁴⁶

The court in *Wilson Trading Corp. v. David Ferguson, Ltd.*,⁴⁷ invalidated a time clause by applying section 2-719(2). The case involved the sale of a quantity of yarn which was delivered, cut, and knitted into sweaters, and then washed. It was then discovered that the color of the yarn had shaded,⁴⁸ thus making the sweaters unmerchantable. The sales contract provided:

2. No claims relating to . . . shade shall be allowed if made after weaving, knitting or processing or more than 10

⁴³ U.C.C. § 2-607(3)(a). Section 2-608 (2) provides that a precondition to revocation of acceptance is that the goods not be changed in a substantial way except where the change is caused by their own defects.

⁴⁴ *Schneider v. Person*, 34 Pa. D. & C.2d 10, 13 (C.P. 1964); *General Foods Corp. v. Bittinger Co.*, 31 Pa. D. & C.2d 282, 285 (C.P. 1963).

⁴⁵ U.C.C. § 2-719(2) provides that "where circumstances cause an exclusive or limited remedy to fail of its essential purpose remedy may be had as provided in this Act."

⁴⁶ U.C.C. § 2-719, Comment 1.

⁴⁷ 23 N.Y.2d 398, 244 N.E.2d 685, 297 N.Y.S.2d 108 (1968).

⁴⁸ *Id.* at 401, 244 N.E.2d at 686, 297 N.Y.S.2d at 110. "Shaded" means that there is a variation of color from piece to piece and within each piece.

days receipt of shipment. . . . The buyer shall within 10 days examine the merchandise for any and all defects.

....

4. . . . It is expressly agreed that no representations or warranties . . . have been or are made by the seller except as stated herein, and the seller makes no warranty, express or implied, as to the fitness for the buyer's purposes of yarn purchased hereunder, seller's obligations, except as expressly stated herein, being limited to the delivery of good merchantable yarn⁴⁹

The seller did not dispute the fact that the yarn was unmerchantable, but relied on the buyer's failure to present his claim within the time limit. The buyer claimed that the time limit was unreasonable. The court cited section 2-607(3)(a) as providing buyers with a reasonable time for notification, but also recognized that the Code allows parties to modify warranties and to limit times for notice and remedies for their breach.

The court held that the limitation was invalid under section 2-719 (2),⁵⁰ noting that the Official Comment to that section states that it is the essence of a sales contract that at least minimum remedy be available in case of breach, and that any clause that limits or modifies the remedial provisions of Article 2 in an unconscionable manner may be deleted, in which case the remedies provided by the article, become applicable.⁵¹ The court said that the time clause eliminated all remedy for defects that were not reasonably discoverable before knitting and processing, and therefore section 2-719(2) applied. The limitation clause, so far as it related to latent defects, could not stand and gave way to the general rule that a buyer has a reasonable time after he discovers or should have discovered the defect to notify the seller of the breach of warranty.⁵²

Although the result reached in this case was similar to pre-Code cases, the approach was totally different in that a remedy theory was applied. In a concurring opinion Chief Judge Fuld disagreed with the reasoning of the court. He said the question was simply whether the time limit was manifestly unreasonable when applied to the type of latent defect mentioned in the case.⁵³ He asserted that the case came under section 1-204, and that it was "not necessary to consider the relevancy, if any, of other provisions of the Uniform Commercial Code (e.g., §§ 2-302, 2-316, 2-719), dealing with 'unconscionable' contracts or clauses, exclusion or implied warranties of or limitations on damages."⁵⁴ The majority opinion was in fact rather unclear, if not confus-

⁴⁹ *Id.*

⁵⁰ *Id.* at 404, 244 N.E.2d at 688, 297 N.Y.S.2d at 112.

⁵¹ *Id.* at 403, 244 N.E.2d at 688, 297 N.Y.S.2d at 112. The court cited U.C.C. § 2-719, Comment 1.

⁵² *Id.* at 405, 244 N.E.2d at 688, 297 N.Y.S.2d at 113. The court cited U.C.C. § 2-607(3)(a).

⁵³ *Id.* at 406, 244 N.E.2d at 689, 297 N.Y.S.2d at 114.

⁵⁴ *Id.*

ing, since the court cited many different sections, and then settled on 2-719(2) to invalidate the time clause.⁵⁵ The court in using section 2-719(2) joined authorities who view this section as governing within the theory of remedies, a clause limiting time for notice of breach.⁵⁶ This view states that if the time limit, though reasonable at the time of agreement, becomes unreasonable through change of circumstances, section 2-719(2) invalidates the time clause.⁵⁷ Thus, under this view one must examine all the circumstances, since "the subsection is not concerned with arrangements which were oppressive at their inception, but rather with the application of an agreement to novel circumstances not contemplated by the parties."⁵⁸ Section 2-719(2), however, has been criticized for being overly broad and for providing means to disregard a party's agreement with respect to remedies without setting any proper standards.⁵⁹

The court in *Neville* also discussed section 2-719(2), but used it not to invalidate a time clause but to invalidate a clause limiting damages to return of the purchase price. In that case the defect was not discoverable until the end product was in consumer hands, and such a remedy as the clause called for was "far below a bare minimum in quantum, and [was] ineffective under the Uniform Commercial Code, § 2-719(2)."⁶⁰ Thus, *Neville* used section 2-719(2) with respect to damages but not with respect to the time clause. Therefore the question arises whether section 2-719(2) should be restricted to clauses which specify the type and amount of damages recoverable. It is submitted that the approach taken by the *Neville* court is correct. This is shown by the placement of that section within Article 2. Section 2-719 discusses damages, sufficient remedies and modification of the measure of damages,⁶¹ while section 2-718 deals with liquidated dam-

⁵⁵ Sections of the U.C.C. cited by the court included §§ 1-204(1), 2-302(2), 2-314(2), 2-316(1), (4), 2-607(3) (a), 2-718, 2-719(2).

⁵⁶ See Ganz, Limitation of Liability Under the Sales Provisions of the Uniform Commercial Code, 14 DePaul L. Rev. 73, 79 (1964).

⁵⁷ See Hawkland, Limitations of Warranty Under the Uniform Commercial Code, 11 How. L.J. 28, 42 (1965).

⁵⁸ 1 N.Y.S.L.R.C., Study of the U.C.C. 584 (1955).

⁵⁹ N.Y.S.L.R.C., Proceedings of the Commission 401 (1956). Section 2-719(2) was disapproved by the commission.

⁶⁰ 294 F. Supp. at 655.

⁶¹ U.C.C. § 2-719 provides:

(1) Subject to the provisions of subsection (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation

ages.⁶² These sections declare that if a contract provides for liquidated damages and subsequent events make it clear that another adequate remedy is conveniently available, the liquidated damage provision fails of its essential purpose and gives way to general remedies.⁶³ Thus, section 2-719(2) is primarily applicable to damage clauses and to liquidated damage remedies. The section 2-719 approach is based on the fact that the buyer is left without a remedy. However, before one can apply section 2-719 it must first be decided if the buyer has a valid claim, and this is done by applying section 1-204. Thus, unless the time clause is manifestly unreasonable, the buyer would not have a valid claim and section 2-719 could not be applied.

C. *The Unconscionability Approach*

The *Wilson* court⁶⁴ and the Official Comments to sections 1-204 and 2-719 use the term "unconscionability." This is another Code theory applicable to time clauses and latent defects which brings yet a third section of the Code into the problem. Section 2-302(1) provides that if a court as a matter of law finds a contract or any part of one to be unconscionable at the time it was made, it may refuse to enforce it, or may enforce the contract without the unconscionable clause, or may limit the application of such clause to avoid any unconscionable result.⁶⁵ Section 2-302 has been suggested as an approach to the problem of time limitations,⁶⁶ but no cases have used this section to invalidate a time clause as unconscionable. Unconscionability generally includes an absence of meaningful choice on the part of one of the parties coupled with contract terms very favorable to the other. To determine the presence of meaningful choice an examination is

or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

⁶² U.C.C. § 2-718.

⁶³ Hawkland, *supra* note 57, at 39.

⁶⁴ 23 N.Y.2d at 403 & n.1, 244 N.E.2d at 688 & n.1, 297 N.Y.S.2d at 112 & n.1.

⁶⁵ U.C.C. § 2-302 provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

⁶⁶ *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 403, 244 N.E.2d 685, 687, 297 N.Y.S.2d 108, 112 (1968). Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 Iowa L. Rev. 843, 858 (1960). The Comment to § 2-302 cites a pre-Code case which involved a time clause and a latent defect as illustrative of the underlying basis of the section. However, that case, *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.*, 93 Utah 414, 73 P.2d 1272 (1937), invalidated the clause as being unreasonable, which may indicate that § 1-204 is most effective to meet the problem of time clauses.

made of the circumstances surrounding the transaction to establish, for example, whether there was such gross inequality of bargaining power on the part of one of the parties sufficient to negate any real choice.⁶⁷ According to the Official Comment to section 2-302, the basic test is whether, in light of the general commercial background and needs of the particular case, the clause involved is so one-sided as to be unconscionable under the circumstances existing at the making of the contract.

The court in *Wilson* spoke of unconscionability and section 2-302 by citing the Official Comment to section 2-719 and then stating that contractual limitations on remedies are generally to be enforced unless unconscionable.⁶⁸ Yet the court refused to rule on the issue of the unconscionability of the time clause, declaring that it was unnecessary since section 2-719(2) applied.⁶⁹ The court felt that sections 2-719(2) and 2-302 must work together, that 2-719(2) incorporates 2-302, and that section 2-719 was better suited to meet the problem of time clauses than section 2-302 alone.

Although the drafters of the Code seemingly support this view since the Official Comment to section 2-719 uses the word "unconscionable" apparently to mean "very unfair" or "totally unreasonable," the concept of unconscionability as used in section 2-302 has a different meaning, and is more limited in scope and operation than in section 2-719. These sections are not necessarily partners, and section 2-719 does not include or incorporate the concept of unconscionability as used in section 2-302. A clause which violates section 2-719 may not be unconscionable, whether one views the section as applying to time limitations or not. Under section 2-719 different facts must be established, for it must be ascertained whether the buyer lost a substantial value of the bargain and whether the essential purpose of the time clause failed. Under section 2-719(2), even if the clause was originally fair, if later circumstances leave the buyer without a remedy the clause may be invalidated. Under section 2-302 later circumstances are immaterial, since a finding of unconscionability is based only upon the circumstances existing at the making of the contract.⁷⁰ Just as it is submitted that the *Wilson* court incorrectly applied section 2-719 to the area of time clauses, it is further submitted that it could not have applied section 2-302, because it did not determine if there was inequality of bargaining power or if there was overbearing by the seller, and did not examine the situation at the time the contract was signed.⁷¹

⁶⁷ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

⁶⁸ 23 N.Y.2d at 403, 244 N.E.2d at 688, 297 N.Y.S.2d at 112.

⁶⁹ *Id.* at 404, 244 N.E.2d at 688, 297 N.Y.S.2d at 112.

⁷⁰ U.C.C. § 2-302 & Comment 1. See also 58 Dick. L. Rev. 161 (1954).

⁷¹ The court rejected *Vandenberg* and stated that the *Vandenberg* court neglected to consider unconscionability and other related code sections, and that the question of limitations of remedy is for the court and not the jury. Yet the *Wilson* court itself did not find the clause unconscionable. This seems to indicate the *Wilson* court would prefer the court to rule on time clauses and therefore refused to apply § 1-204 which

The history of section 2-302 indicates that it is the most difficult of the three theories to apply to time clauses. Most cases applying section 2-302 involve parties of such unequal bargaining power as to render the agreement oppressive. As the Official Comment to the section states: "The principle is one of prevention of oppression and unfair surprise."⁷² In a case where a time limitation was forced on the buyer by a seller in a superior position, a court could find the clause unconscionable. But usually in time limitation cases such is not the circumstance. The two parties are, in most instances, businessmen of basically equal bargaining position, and the time clause is part of the commercial background, facts which must be taken into account and examined by the court.⁷³ As for unfair surprise, normally the buyer knows of the clause and is not surprised, or, if so, not unfairly.⁷⁴ Even if the result is unfair, if the two parties had equal bargaining positions, then the clause is not unconscionable. Only when a contract is not the result of a true bargain can a court then consider unconscionability.⁷⁵

Some commentators believe the application of the concept of unconscionability to unreasonably brief time clauses would not be a great departure from the reasonableness approach, but would be more direct and realistic.⁷⁶ The reason given is that unconscionability is concerned with the objective situation of the parties with reference to the contract, rather than with the supposed intent of the parties, and that it has the necessary flexibility to deal with a broad range of commercial transactions.⁷⁷ However, these commentators misconstrue the purpose of section 2-302 and the application of 1-204, the rule of reasonableness. Section 1-204 also has flexibility, and allows consideration of the commercial background and the nature, purpose and circumstance of the transaction. Also, under section 1-204 intent is not the prime consideration, but, rather, whether the clause itself, considered apart from the intent of the parties, is reasonable.

One difference between the two approaches is that section 1-204 requires a determination as to whether the time limitation was sufficiently reasonable viewed from the present looking back, while section

is the reasonableness test. 23 N.Y.2d at 403 n.1, 244 N.E.2d at 687-88 n.1, 297 N.Y.S.2d at 112 n.1.

⁷² U.C.C. § 2-302, Comment 1. See 58 Dick. L. Rev. 161, 162 (1954), which states: It would seem that by "oppression and unfair surprise" it is meant any party who has had a chance to inquire into the merits and consequences of the bargain and who has had the competency to understand it, could not be a victim of oppression and unfair surprise.

⁷³ See U.C.C. § 2-302, Comment 1. See also 58 Dick. L. Rev. 161, 163 (1954).

⁷⁴ See Comment, Bargaining Power and Unconscionability: A Suggested Approach to U.C.C. Section 2-302, 114 U. Pa. L. Rev. 998 (1966), which states that if the buyer should reasonably have known and understood the relevant terms, then if surprised, the surprise is not unfair.

⁷⁵ Id. at 1002. "[T]hat inequality of bargaining power should be a *sine qua non* to a finding of unconscionability may be seen by analysis of the relation between that section 2-302 and the doctrine of freedom of contract." Id. at 1001.

⁷⁶ Note, Unconscionable Contracts: The Uniform Commercial Code, 45 Iowa L. Rev. 843, 858 (1960).

⁷⁷ Id.

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2-302 only looks to the circumstances at the time of the making of the contract.⁷⁸ Thus, under section 1-204 if the defect was patent the clause is reasonable, but if the defect was latent then the clause is most likely unreasonable and void. Although apparently fair and reasonable at the onset, circumstances which were unforeseen have caused the clause to become unreasonable and section 1-204 applies. Under section 2-302 a court cannot say that the circumstances have caused a time clause to become unconscionable. The court cannot apply hindsight, since the clause was either unconscionable at the onset or not at all. Another difference is that section 2-302 requires an examination to determine oppressiveness, while section 1-204, requires a determination as to the reasonableness of the length of time. Section 1-204 therefore is clearly more applicable to the problem of time clauses than section 2-302. Also the use of section 2-302 puts a taint on the whole contract, even if only the time clause is struck as unconscionable. With the use of section 1-204 the rest of the contract is unaffected. Thus it is concluded that section 2-302 is neither appropriate nor necessary since section 1-204 clearly applies and provides adequate remedies.

CONCLUSION

Of the three Code sections applicable to time limitations in warranty clauses, the most appropriate is section 1-204. Section 2-719 is inappropriate since it is primarily concerned with liquidated damage provisions. Section 2-302 is difficult to apply since it requires the courts to make a precise and limited factual determination. Since that determination does not consider circumstances arising after the time of the making of the contract, factors which are relevant to the validity of a time clause cannot be taken into account under section 2-302. Section 1-204, however, is primarily concerned with time clauses, and it requires the court to consider only those factors relevant to the reasonableness of the time clause. That section's flexibility precludes the application of other Code sections to problems relating to time limitations on warranties.

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⁷⁸ U.C.C. § 2-302.